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No. 91-1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

BIG HORN COAL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION RESTATED

Where, after reaching a bargaining impasse with the union, an employer lawfully and unilaterally implements terms and conditions of employment contained in its final, unaccepted offer, and where the union thereafter conducts a nine-month economic strike, may the union subsequently maintain an action under Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), to enforce as a "contract[ ]" the employer's unilaterally implemented terms and conditions of employment?

STATEMENT REQUIRED BY RULE 29.1

Respondent Big Horn Coal Company, a Wyoming corporation, is a subsidiary of Kiewit Mining Group, Inc., which is a subsidiary of Peter Kiewit Sons', Inc. Peter Kiewit Sons', Inc. has no parent company.

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COUNTERSTATEMENT OF THE CASE

Respondent Big Horn Coal Company (hereinafter referred to as "Big Horn" or "the Company") and Petitioner were parties to a 1984 collective bargaining agreement that by its terms expired on March 23, 1987. By mutual agreement, the parties extended the contract to June 1, 1987 while they continued efforts to negotiate a successor contract. On June 4, 1987, Big Horn reiterated in writing what was, by its terms, its "*last and final offer*" to Petitioner. R.1 (Complaint), Ex. B at 15 (emphasis in original). That offer delineated the contract sections that the Com-

pany proposed to change from the prior agreement and further stated that "all other provisions of the 1984 labor agreement not hereinbefore mentioned remain in effect under our offer." *Id.* Among the provisions not so mentioned were the grievance and arbitration provisions of the expired agreement. App. 2a & n.1.

On July 1, one month after the contract extension had expired and with the parties still unable to agree on the terms of a new contract, Big Horn "unilaterally implemented working terms and conditions contained in its last offer." App. 8a.[1] Further negotiations thereafter continued to prove fruitless, and on October 5, 1987, Petitioner and the Big Horn employees it represents commenced an "economic strike" against Big Horn in an effort to enforce their bargaining demands. App. 8a.[2] This strike continued until June 27, 1988—a total of 267 days, or nearly nine

[1] It is undisputed that as of July 1, 1987, "negotiations [had] reached an impasse." App. 2a. Hence, there is no question concerning the lawfulness of the Company's unilateral implementation of its final offer. *See, e.g., Laborers Health & Welfare Trust Fund v. Advanced Light Weight Concrete Co., Inc.*, 484 U.S. 539, 544 n.5 (1988) ("[A]fter bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the [National Labor Relations] Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.") (quoting *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *aff'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (1968)).

[2] "[A]n 'economic strike' is a strike over wages, hours, or terms and conditions of employment." *George Banta Co., Inc. Banta Div. v. NLRB*, 686 F.2d 10, 14 n.5 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). "[E]conomic strikes generally are used in attempting to enforce economic demands upon the employer." 2 *The Developing Labor Law* 1007 (C. Morris 2d ed. 1983).

months. App. 3a.[3] As of late 1989 when the parties' briefs were filed in the Tenth Circuit, Petitioner and the Company *still* had not agreed on a new collective bargaining agreement. App. 5a n.2.

After the strike ended, the Company refused to reinstate 18 of the striking employees because they had engaged in serious strike-related misconduct. Each of the 18 filed a grievance protesting his discharge, R.1 (Complaint) ¶ 12, and "Big Horn agreed to process the grievances." R.17 (Affidavit of UMWA District 15 President Terry Benson) ¶ 6.[4] When Petitioner and the Company were unable to resolve the grievances, Petitioner demanded arbitration. The Company refused to submit to arbitration on the grounds that the grievances were not arbitrable. App. 3a.

Petitioner then brought this action pursuant to Section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), seeking an order to compel the Company to arbitrate, on the grounds that the Company's unilateral implementation of its last and final offer extended the Company's contractual obligation to arbitrate. App. 3a. The district court granted Petitioner's motion for summary judgment and denied the Company's motion, holding that "the parties by their acts intended to abide and be

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[3] The court of appeals mistakenly characterized the strike as lasting seven months. App. 5a.

[4] Employers and unions have a statutory duty under the National Labor Relations Act ("NLRA") to confer and seek agreement over employee grievances that arise during the hiatus between the expiration of a collective bargaining agreement and the reaching of a new agreement. *Hilton-Davis Chemical Co.*, 185 N.L.R.B. 241, 242 (1970), *cited in Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215, 2222 (1991). That statutory duty does not extend to arbitrating such grievances. *Id.*, 111 S. Ct. at 2222.

bound by the unchanged terms of the expired collective bargaining agreement." App. 12a.

On appeal, the Tenth Circuit reversed *per curiam*. Citing, *inter alia*, its previous decision in *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990), the court of appeals stressed that "jurisdiction under Section 301(a) of the Labor-Management Relations Act arises when redress is sought for 'violations of *contracts* between an employer and a labor organization.' " App. 4a (quoting 29 U.S.C. § 185(a) as set forth in *Gold Star*, 897 F.2d at 1026). The court also emphasized that:

> The contract between the parties required for jurisdiction need not be a written, signed collective bargaining agreement but may exist as any informal agreement between the parties significant to the maintenance of labor peace between them. *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962). It suffices that the parties' intent to abide by the agreed-upon provisions of any such informal agreement is in some manner manifest. [Citing cases.]

App. 4a.

Based on the undisputed record, the court of appeals concluded that the district court's determination that a contractual relationship arose between Petitioner and the Company was "unsupported." App. 5a. Noting that "[e]mployer implementation of a last and final offer is, by itself, insufficient to invoke jurisdiction [under Section 301] absent some manifestation of acceptance of the offer sufficient to create a contract," and that "simply spotlighting management's exercise of its statutory right to implement its last and final offer does not establish the contractual basis necessary for jurisdiction," the court held:

> The facts of the present case . . . suggest implicit rejection of the employer's offer. . . . Employee conduct after July 1, 1987, did not evince an acceptance of the Company's last offer. To the contrary, *the commencement of a seven-month strike on October 5, 1987, during which time the alleged misconduct occurred, shows continued dissatisfaction with and rejection of the employer's offer.*

App. 5a (citation and footnote omitted, emphasis added).

REASONS FOR DENYING THE WRIT

This case presents neither the question nor the conflict that the Petition suggests. The Tenth Circuit's holding is a garden-variety application of well established Section 301 principles—many of which this Court reaffirmed last term in *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215 (1991)—to undisputed record evidence. To say the least, the decision below presents no issues appropriate for review by this Court.

1. In an effort to create a reviewable sow's ear out of a silk purse, Petitioner states the question presented in this case as whether "contractual obligations . . . enforceable under Section 301(a) . . . [may] aris[e] from the course of dealings and conduct of the parties in the absence of a formal collective bargaining agreement." Petition at i. According to Petitioner: "[I]f the rationale of the Tenth Circuit prevails, Section 301 will only be available in those instances where a party can present a formal contract to the court and prevail on the merits. . . ." *Id.* at 5.

Unfortunately, Petitioner seriously mischaracterizes the decision below, which was expressly premised on the as-

sumption that a "formal contract" is *not* a prerequisite for jurisdiction under Section 301(a):

> The contract between the parties required for jurisdiction need not be a written, signed collective bargaining agreement but may exist as any informal agreement between the parties significant to the maintenance of labor peace between them. *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962). It suffices that the parties' intent to abide by the agreed-upon provisions of any such informal agreement is in some manner manifest. *Bobbie Brooks, Inc. v. Int'l Ladies Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987); *see also United Paperworkers Int'l Union v. Wells Badger Industries, Inc.*, 835 F.2d 701, 704 (7th Cir. 1987).

App. 4a. Thus, the entire Petition begs a question that the Tenth Circuit, consistent with the precedents of this Court and other courts, answered in Petitioner's favor. Petitioner simply takes issue with the Tenth Circuit's common sense conclusion, based on the undisputed record, that "[t]he facts of the present case . . . show[ ] [Petitioner's] continued dissatisfaction with and rejection of the employer's offer." App. 5a. Such a case does not warrant this Court's attention.

2. As pertinent here, Section 301(a) states with the utmost clarity:

> Suits for *violation of contracts* between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (emphasis added). Despite this plain language, Petitioner cryptically asserts that review by this

Court is necessary "to establish the inclusive reach of Section 301." Petition at 5-8. Yet the Tenth Circuit's holding that a district court lacks jurisdiction under Section 301(a) in the absence of a "contract" faithfully implements Section 301(a) as consistently interpreted by this Court and the courts of appeals.[5] *See, e.g., Wooddell v. International Bhd. of Electrical Workers*, 60 U.S.L.W. 4024, 4025 (U.S. Dec. 4, 1991) (to vest subject-matter jurisdiction in the district court, "a suit properly brought under § 301 *must* be a suit either for *violation of a contract* between an employer and a labor organization representing employees in an industry affecting commerce or for *violation of a contract* between such labor organizations") (emphasis added); *Litton Financial Printing*, 111 S. Ct. at 2225 ("Section 301 . . . does not provide a federal court jurisdiction where a bargaining agreement has expired. . . ."); *District Two v. Grand Bassa Tankers, Inc.*, 663 F.2d 392, 398 (2d Cir. 1981) ("Of the hundreds of actions invoking federal jurisdiction under the employer-labor organization contract clause of § 301(a) we have not found any case which did not involve *an agreement* relating to the employer's relationship with its own employees.") (emphasis added).[6]

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[5] Petitioner concedes, as it must, that Section 301(a) is jurisdictional. Petition at 5. If Petitioner's argument is that the federal district courts should have jurisdiction to decide the merits of labor-management disputes even after the court determines that no "contract" (either formal or informal) exists between the parties, Petitioner must address that argument to Congress.

[6] *See also Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 23-27 (1962) (discussing at length whether strike settlement agreement was a "contract" sufficient to give rise to jurisdiction under Section 301(a)); *Teamsters Local 249 v. Western Pennsylvania Motor Carriers Ass'n*, 660 F.2d 76, 83 (3d Cir. 1981) ("a

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Likewise, the Tenth Circuit's conclusion that, on the undisputed record, "no contract [existed] between the parties upon which to base jurisdiction under Section 301," App. 2a, is completely unremarkable. The Company's unilateral implementation of its last and final offer was nothing more than just that—an exercise of its post-impasse right *unilaterally* to put into effect an offer Petitioner never accepted. *See supra* note 1.[7] On its face and as a long-established matter of law, it did not constitute a promise that the Company would abide by the expired arbitration provisions (or any other provisions of the defunct agreement) in the absence of a mutually binding, mutually agreed-to new contract. *See, e.g., Litton Financial Printing*, 111 S. Ct. at 2225 ("An expired [collective bargaining agreement] . . . is no longer a 'legally enforceable document.' ")

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[6] *continued*

prerequisite for section 301 jurisdiction is a contract between the employer and labor organization").

Enforcement of the jurisdictional prerequisite of a "contract" under Section 301(a) is particularly appropriate where, as here, a party invokes the district court's jurisdiction to enforce an alleged contractual obligation to arbitrate. *Litton Financial Printing*, 111 S. Ct. at 2222 ("[A]rbitration is a matter of consent, and . . . it will not be imposed upon parties beyond the scope of their agreement. . . . If, as the Union urges, parties who favor labor arbitration during the term of a contract also desire it to resolve postexpiration disputes, the parties can consent to that arrangement by explicit agreement."); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract").

[7] This post-impasse right of the employer unilaterally to implement its final offer is fundamental to the balance of economic power that the NLRA strikes between labor and management. *NLRB v. Katz*, 369 U.S. 736, 745 (1962); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488-90 (1960); *NLRB v. American National Ins. Co.*, 343 U.S. 395, 404 (1952); *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 65 (1964).

(quoting *Office & Professional Employees Ins. Trust Fund v. Laborers Fund Administrative Office of Northern California, Inc.*, 783 F.2d 919, 922 (9th Cir. 1986)); *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22, 26-27 (2d Cir. 1988) ("Rights and duties under a collective bargaining agreement do not . . . survive the contract's termination at an agreed expiration date."); *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co.*, 312 F.2d 181, 184 (2d Cir. 1962) ("Where no [contract] extension is negotiated, or where the period of the extension has also expired, there is no ground whatever for considering that the old agreement still governs the relationship of the parties."), *cert. denied*, 374 U.S. 830 (1963).

Indeed, Petitioner has not cited, either in its Petition to this Court or in its brief below, a single case suggesting that the jurisdictional prerequisite of a "*contract*" can be met where, as here, the union goes on strike and the parties remain at impasse following the employer's unilateral implementation of its unaccepted final offer.[8] To the con-

[8] As with its mischaracterization of the question presented for review, Petitioner overreaches in mischaracterizing the case law discussed at pages 8-11 of the Petition as presenting an "unsettled conflict" between the circuits requiring resolution in the instant case. Each of the cases cited by Petitioner involved the issue whether jurisdiction under § 301(a) is limited to suits (such as that in the instant case) brought "for *violation* of contracts," or whether such jurisdiction also extends to suits brought to *challenge or confirm the validity* of contracts. *See, e.g., International Bhd. of Elec. Workers v. Sign-Craft, Inc.*, 864 F.2d 499, 501 (7th Cir. 1988) (holding that jurisdiction exists under § 301 over such suits); *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1323 (9th Cir. 1988) (suit to rescind contract allegedly procured through fraudulent inducement), *cert. denied*, 490 U.S. 1030 (1989). That issue is plainly absent here. Moreover, in each of the cases cited by Petitioner, the court recognized that the existence of a "contract" (even if only one that is allegedly voidable) is a

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trary, the consistent case law confirms the Tenth Circuit's conclusion that Petitioner manifested its "continued dissatisfaction with and rejection of the employer's offer." App. 5a. *See, e.g., Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970) ("[A] no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit the grievance disputes to the process of arbitration."); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956) ("Like other contracts, [a collective bargaining agreement] must be read as a whole. . . ."); *Bobbie Brooks, Inc. v. International Ladies' Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987) ("A meeting of the minds of the parties must occur before a labor contract is created. . . . As a general rule, a contract does not arise if the union and management have not resolved a dispute over a substantive term."); *United Paperworkers Int'l Union v. Wells Badger Industries, Inc.*, 835 F.2d 701, 703-04 (7th Cir. 1987) ("the intention of the parties [to be bound by a collective bargaining agreement] under most circumstances must be determined on the basis of an objective standard—the parties' manifested mutually assent"); *Globe Seaways, Inc. v. National Marine Eng. Beneficial Ass'n*, 451 F.2d 1159, 1163 (2d Cir. 1971) ("It should not be lightly in-

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[8] *continued*

jurisdictional prerequisite under § 301(a), regardless of the type of relief sought. *See, e.g., Rozay's Transfer*, 850 F.2d at 1326. Thus, even if the academic exercise at pages 8-11 of the Petition discusses a bona fide "conflict," the resolution of any such conflict must await another case.

ferred that a union, at its own choosing, can strike over some matters and arbitrate over others.").[9]

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[9] *See also Warehousemen's Union Local No. 206 v. Continental Can Co., Inc.*, 821 F.2d 1348, 1350 (9th Cir. 1987) ("Normal rules of offer and acceptance govern in collective bargaining."); *NLRB v. IBEW Local No. 22*, 748 F.2d 348, 350 (8th Cir. 1984) ("the general rules of offer and acceptance" determine the existence of a labor contract); *Capitol-Husting Co., Inc. v. NLRB*, 671 F.2d 237, 242 (7th Cir. 1982) ("the normal rules of offer and acceptance are generally determinative of the existence of a collective bargaining agreement"); *Genesco, Inc. v. Joint Council 13*, 341 F.2d 482, 486 (2d Cir. 1965) (concluding that no labor agreement existed "by applying ordinary principles of contract law").